



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AO59

Copayment for Extended Care Services

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend how VA determines the “spousal resource protection amount,” which is the amount of liquid assets of a veteran and community (i.e., not institutionalized) spouse that is considered unavailable when calculating the veteran’s maximum monthly copayment obligation for extended care services longer than 180 days. This proposed rule would define the “spousal resource protection amount” by reference to the Maximum Community Spouse Resource Standard, which is published each year by the Centers for Medicare and Medicaid Services (CMS) and is adjusted annually based on the Consumer Price Index. This change would have the immediate effect of increasing the spousal resource protection amount from \$89,280 to \$115,920, and would ensure that the spousal resource protection amount stays consistent with the comparable protection for the spouses of Medicaid recipients.

DATES: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AO59—Copayment for Extended Care Services.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461-1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Certain veterans who receive more than 21 days of extended care services provided or paid for by VA are liable for copayments for the care they receive. Section 1710B(d)(2) of title 38, United States Code, requires VA to develop a methodology to determine the amount of those copayments. The methodology must establish a maximum monthly copayment based on the income and assets of the veteran and the veteran’s spouse, and must protect the spouse of a

veteran from financial hardship by excluding some of the income and assets of the veteran and spouse from the copayment obligation.

VA established its methodology in 38 CFR 17.111. Under the current rule, veterans who are subject to copayment obligations must pay \$5 to \$97 per day, depending on the type of extended care received, up to the maximum monthly copayment amount. Married veterans who receive over 180 days of extended care and who have a spouse residing in the community are eligible for spousal resource protection. The spousal resource protection excludes a certain amount of the veteran's and spouse's liquid assets, the "spousal resource protection amount," from consideration in determining a veteran's maximum copayment obligation. Thus, a higher spousal resource protection amount provides greater benefit to the veteran and spouse because it increases the portion of the family's liquid assets that are available for expenses other than copayments.

Under current § 17.111(d)(2)(vi), the "spousal resource protection amount" is the total value of the veteran's and spouse's liquid assets up to \$89,280. This figure was derived from the comparable Medicaid spousal allowance, the Maximum Community Spouse Resource Standard, in effect when we promulgated § 17.111(d)(2)(vi). The comparable Medicaid provisions, known as the spousal impoverishment provisions, were enacted by Congress in 1988 to protect married couples from having to deplete their combined savings before Medicaid would pay for certain long-term care services. Under these provisions, states participating in Medicaid are required to protect a certain amount of the couple's combined resources within federally mandated Minimum and Maximum Community Spouse Resource Standards. To keep pace with inflation, these

standards are determined annually based on the Consumer Price Index. The Maximum Community Spouse Resource Standard in effect on the date of this proposed rule is \$115,920.

By contrast, VA's current definition of the spousal resource protection amount has no provision to allow for automatic annual adjustments, and we have not amended the amount since the final rule was published on July 1, 2004 (69 FR 39845). To ensure that a veteran's spouse living in the community is able to maintain sufficient liquid assets while the veteran is receiving extended care services for longer than 180 days, we propose to amend paragraph (d)(2)(vi) to provide that the spousal resource protection amount be adjusted annually based on the Maximum Community Spouse Resource Standard. This would ensure that the spousal resource protection amount accounts for inflation and is consistent with the comparable protections for spouses of Medicaid recipients.

We note that in implementing CMS' standards, many states chose to adopt the Maximum Community Spouse Resource Standard amount, providing recipients with the maximum possible protection. Others selected the Minimum Community Resource Standard amount, giving recipients that amount of protection and no more. When we initially proposed defining "spousal resource protection amount" on October 16, 2003 (68 FR 59557), at least 23 State Medicaid Programs used \$89,280 as the benchmark for protecting spousal assets for Medicaid purposes. This figure was the Maximum Community Spouse Resource Standard in effect at that time.

We adopted the Maximum Community Spouse Resource Standard in response to the statutory mandate that the methodology we develop for establishing copayment

amounts for extended care services must protect the spouse of a veteran from financial hardship by not counting all of the income and assets of the veteran and spouse.

38 U.S.C. 1710B(d)(2)(B). Veterans and their non-institutionalized spouses would still benefit if VA chose a lower number for the spousal resource protection amount, but this would result in a lesser degree of liquid asset protection than that realized by many similarly situated spouses of non-veterans applying for Medicaid benefits for certain long-term care services outside of VA.

Community spouses (spouses who are not institutionalized) must maintain a separate residence, and they have daily living expenses separate and apart from those attributable to the veteran receiving extended care services. It is important that the spouses be able to maintain assets for these expenses. VA believes that the Maximum Community Spouse Resource Standard remains the appropriate benchmark for determining the spousal resource protection amount.

Although VA always applied the \$89,280 amount in the current rule, the rule actually defines the spousal resource protection amount as the value of liquid assets “not to exceed” \$89,280 if the spouse is not institutionalized. This places a ceiling on the value of liquid assets that can be retained but does not set a floor, a minimum amount below which the spousal resource protection amount cannot fall. This could be interpreted to mean that VA may choose to assign a lesser dollar value as the spousal resource protection amount. VA believes that this creates an unacceptable degree of uncertainty for veterans utilizing extended care services as well as spouses living in the community. To address this issue, we propose to amend the definition of the spousal resource protection amount to state that it will be equal to the Maximum Community

Spouse Resource Standard published by the CMS as of January 1 of the current calendar year if the spouse is residing in the community (not institutionalized).

VA believes that the proposed changes to paragraph (d)(2)(vi) – defining the spousal resource protection amount as equal to the Maximum Community Resource Amount published by the CMS, and ensuring that this amount adjusts annually – will provide a greater deal of protection to the veteran and the non-institutionalized spouse during a change in circumstances that can place financial strains on the family. Further, VA believes that these proposed changes will eliminate any uncertainty that may exist regarding the value of liquid assets that may be retained by the non-institutionalized spouse.

In addition to the above, we propose to remove § 17.111(g), which consists entirely of a copy of VA Form 10-10EC, Application for Extended Care Services. The form is readily available to veterans both in hard copy and electronically, and we do not believe that the public uses or relies on the reprint of this form in the Code of Federal Regulations. Moreover, the process of amending a regulation can be lengthy. If amendments are required to the form, the reprint of it in paragraph (g) may be out of date for some period of time while the regulation is updated through the regulatory process. In short, we no longer believe it is useful to include forms in our regulations.

Effect of rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform

with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule would directly affect only individuals and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory

Planning and Review) defines a “significant regulatory action” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, Department of Veterans Affairs, approved this document on April 11, 2013 for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: April 17, 2013

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of General Counsel,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 17 as set forth below:

PART 17 -- MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.111 by:

- a. Revising paragraph (d)(2)(vi).
- b. Removing paragraph (g).

The revision reads as follows:

§ 17.111 Copayments for extended care services.

* * * * *

(d) * * *

(2) * * *

(vi) Spousal resource protection amount means the value of liquid assets equal to the Maximum Community Spouse Resource Standard published by the Centers for Medicare and Medicaid Services (CMS) as of January 1 of the current calendar year if the spouse is residing in the community (not institutionalized).

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